Supreme Court, U.S.
FILED
FEB 19 2004
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(3)

No. 03-911

IN THE

Supreme Court of the United States

S.D. MYERS, INC.,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO AND SAN FRANCISCO HUMAN RIGHTS COMMISSION,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents' Opposition to S.D. Myers, Inc.'s Petition for Certiorari *nowhere denies the interstate impact of the ordinance at bar* on employers throughout the country. Instead, the City and County of San Francisco and the San Francisco Human Rights Commission's (the "City") Opposition attempts to sidestep the issue by asserting that (a) S.D. Myers has waived its right to use public admissions of the interstate impact of the ordinance that were not produced in discovery and were not disclosed publicly until long after the close of discovery; (b) S.D. Myers waived claims or has no standing to assert them; (c) there can be no conflict between cases addressing facial versus as-applied violations of the dormant commerce clause; and (d) S.D. Myers' Petition was untimely because S.D. Myers waited to seek review until its state-law claims were adjudicated. Significantly, the City does not address the conflict between the Ninth Circuit and *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982), which held that a "State has no legitimate interest in protecting nonresident[s]."

The Opposition fails to counter the compelling reasons for this Court to grant a writ of certiorari. S.D. Myers files this Reply only to address points raised in the Opposition that may not have been fully addressed in the Petition.

I. S.D. MYERS HAS STANDING

S.D. Myers' injury occurred on November 24, 1997, when the City refused to award it a contract, even though S.D. Myers' had submitted the lowest bid. However, the City argues that the injury was illusory because of an affidavit signed a year later. (Opposition at 6.) The idea that events that occur after-the-fact can make a pre-existing injury "illusory" is a novel view of an "injury in fact."

The sole reason for the City's refusal to award the contract was that S.D. Myers did not sign an affidavit that it was in compliance with Chapter 12B of the City's Administrative Code (the "ordinance"). At that time, the ordinance applied on its face to "(iii) a contractor's work in other places outside the City within the United States where work related to a City contract is being performed, and (iv) any of a contractor's operations elsewhere in the United States." Chapter 12B.1(d), App. 72a. Accordingly, for S.D. Myers to have obtained the contract, it would have had to agree to provide domestic partner benefits for all of its employees.

The City now argues that it never had occasion to consider whether S.D. Myers would have had to provide domestic partner benefits to anyone other than the four Ohio-based employees who would have worked on the contract in California. (Opposition at 6.) However, the City's position in the district court was that it had the right to enforce the ordinance at any of a contractor's operations in the United States. App. 38a-39a. That is the context in which S.D. Myers affirmed in 1998 that it was unwilling to comply with the ordinance. If the City had been willing to allow S.D. Myers to comply with the ordinance only in regard to employees that S.D. Myers sent to California, S.D. Myers could easily have complied with the ordinance by sending only married employees. The City was unwilling to permit that option in 1997, and its effort to imply otherwise in its Opposition is less than forthright.

II. S.D. MYERS MAY RELY UPON THE CITY'S SUBSEQUENTLY-PUBLISHED ADMISSIONS OF EXTRATERRITORIAL IMPACT OF THE ORDINANCE

The City baldly asserts that S.D. Myers waived the right to rely on the San Francisco Human Rights Commission

("SFHRC") annual reports by failing to raise them below. It cites to pages 5-7 of the Petition for the proposition that the first three reports were on the "City's website by August 2000, three months before the parties argued the case in the Court of Appeals and nearly a year before the court decided it." (Opposition at 18.) Notwithstanding the citation to the Petition for that proposition, what the Petition asserted, based on trial counsel's familiarity with the City's website, was that the reports were posted to the website "subsequent to the Ninth Circuit's decision." Petition at 5. Even if the first three reports had been published on the City's website in August 2000, that was long after the close of discovery and more than a year after entry of summary judgment. In any event, counsel for the City clearly violated the duty under Fed. R. Civ. P. 26(a)(1) to voluntarily disclose the first reports as relevant evidence of the extraterritorial application of the ordinance, as alleged in the trial court. App. 23a. If this evidence that came to light after the Ninth Circuit's decision had been presented to the trial court or the court of appeals, the outcome would surely have been different. Under the circumstances, the City's assertion of waiver is not well grounded.

III. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. Due Process

The City asserts a novel theory of waiver in asserting that S.D. Myers has waived its as-applied due process claim by failing to re-argue it in its reply brief. (Opposition at 9.) S.D. Myers argued both in the trial court and in its opening brief on appeal that the ordinance as applied violated its due process rights. (See Petition at 9, n.8.) The purpose of a reply brief is not to rehash the opening brief, but to respond to arguments

raised by the appellee. *Network LLC v. Centraal Corp.*, 242 F.3d 1347, 1356 (Fed. Cir. 2001) (citing Michael E. Tigar & Jane B. Tigar, *Federal Appeals Jurisdiction and Practice* 469-70 (3d ed. 1999)). Unsurprisingly, the City cites no authority for its claim that failing to rehash an argument in a Reply brief is a waiver.

Despite the City's efforts to minimize the Ninth Circuit's misapplication of *BMW v. Gore*, 517 U.S. 559 (1996), the fact remains that the court's decision is inconsistent with *BMW* and the First Circuit's application of it in *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 69 (1999), *aff'd on other grounds sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). (Petition at 8-10.) Moreover, the First Circuit's reliance on *BMW* was not mere *dicta*–the court clearly viewed the statute at issue as imposing economic sanctions on contractors that did not comply with the Massachusetts law.[1] *Id.* Using a City ordinance to penalize or control legal conduct in other states violates due process. *BMW*, 517 U.S. at 572; *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

B. Interstate Commerce Clause

The City attempts to harmonize the Ninth Circuit's decision with *Natsios* by arguing that the Massachusetts statute was facially discriminatory, while the ordinance is facially neutral. (Opposition at 10-11.) But the portion of the *Natsios* opinion that is in conflict with the Ninth Circuit is the discussion of the statute as applied–the actual regulation of conduct beyond Massachusetts' borders through the practical effect of the

[1]The First Circuit's citation of *BMW* in a discussion of the dormant Commerce Clause simply reflects the overlap between concepts often discussed in both due process and dormant Commerce Clause cases. *See, e.g., BMW*, 517 U.S. at 571-573 (citing Commerce Clause cases); *Edgar*, 457 U.S. at 643 (citing *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

statute. *Natsios*, 181 F.3d at 69-71. That conflict is direct. (Petition at 10-11.)

The City asserts that *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984), has no bearing on this case because the Ninth Circuit assumed that the City was acting as a market regulator. (Opposition at 11.) However, the crux of the *Wunnicke* decision was that Alaska was acting as a market regulator rather than a market participant as well. The Ninth Circuit ruled that the City may impose conditions without being a market participant, while *Wunnicke* held that "[t]he State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market." *Wunnicke*, 467 U.S. at 97. With respect to S.D. Myers, the ordinance imposes conditions far beyond the particular market of electrical transformer maintenance. Thus, *Wunnicke* is directly on point, and the Ninth Circuit's decision is inconsistent with it.

The City misrepresents the holding of *American Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2003), by arguing that the statute at issue there was facially invalid. (Opposition at 12.) In reality, the First Circuit held that "[a]lthough [the statute] *does not discriminate against interstate commerce on its face*, we agree with the district court that it presents a *per se* violation of the dormant Commerce Clause." *Id.* (emphasis added). The City makes the same mistake that the Ninth Circuit did when it assumed that an ordinance cannot be a *per se* violation of the commerce clause unless the statute is facially invalid. *See S.D. Myers v. City and County of San Francisco*, 253 F.3d 461, 466-67, 471 (2001). That is the clear conflict between *S.D. Myers* and *American Booksellers*.

The City reveals a myopic view of the case law dealing with the practical effect of state laws on interstate commerce. According to the City–and the Ninth Circuit–a statute does not have the practical effect of regulating interstate commerce unless it is inconsistent with the laws of other states. (Opposition at 12-13.) While determining the practical effect undoubtedly *includes* evaluating how a provision interacts with the laws of other states, the evaluation is not *limited* to interaction with other laws. Rather, as the First Circuit held in *American Booksellers*, a statute has the "practical effect" of directly regulating interstate commerce when a state (or a city) "'has "projected its legislation" into other States, and *directly regulated* commerce therein' . . . ." *American Booksellers*, 342 F.3d at 104 (quoting *Brown-Forman Distillers Corp. v. New York St. Liquor Auth.*, 476 U.S. 573, 584 (1986) (emphasis added by court). Accordingly, the City is simply wrong in asserting that *S.D. Myers* is not in conflict with any other decisions. (Opposition at 12.)

The City makes a strained waiver argument in an effort to persuade the Court not to consider the conflict between the ordinance and the Nebraska constitutional amendment or other pending constitutional amendments. The City cites *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001), which stands for the unremarkable proposition that arguments not raised or briefed below are waived. (Opposition at 13.) But *TRW* does not address events that occurred subsequent to briefing and oral argument below. In addition, Fed. R. App. P. 28(j), upon which the City also relies, refers to Supplemental Authorities, and explicitly prohibits any argument with a Rule 28(j) submission. Thus, S.D. Myers would have had no opportunity in a Rule 28(j) submission to explain that the possibility of complying with two laws does not mean there is no conflict between them. (See Petition at 14-16.) Moreover, the ordinance has a direct and substantial impact on interstate

commerce independent of its conflict with other laws. (See Petition at 6-7, 14-16.)

Finally, it is a misrepresentation of Michigan law to assert, as the City does, that the proposed constitutional amendment, App. 172a, represents "the current statutory rule of law in Michigan." (Opposition at 14.) The statutes the City cites define marriage as the union of a man and a woman, but they do not prohibit recognition of any other relationship "as a marriage or its legal equivalent." It is the latter provision of the constitutional amendment that, when adopted, will give Michigan employers a constitutional right that San Francisco attempts to take away by its ordinance.

IV. S.D. MYERS' PETITION WAS TIMELY

Respondents advance another quasi-waiver theory when they argue that this Court should deny review because S.D. Myers could have sought review in 2001. (Opposition at 4-5.) If it had done so, of course, the City would have argued that the Petition was premature. Unsurprisingly, Respondents cite no authority for the proposition that a party *should* seek certiorari prior to final judgment. Indeed, this Court does not ordinarily grant review of interlocutory decisions, even though it may. *See Randolph Central School Dist. v. Aldrich*, 506 U.S. 965 (1992); R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 258 (8th ed. 2002). S.D. Myers' Petition was timely, and the permissibility of seeking review before final judgment should not affect the Court's decision.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the Court should grant the Petition for Certiorari.

Respectfully Submitted,

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February 19, 2004